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QUESTIONS PRESENTED

I. Did the issues decided by the District Court and Court of Appeals properly fall within the general policy of Federal Courts non-intervention in state matters, even though the claims are presented using a section 1983 format?

II. Should this Court and lower federal courts exercise jurisdiction over a local real estate tax collection matter alleging section 1983 claims, when the Petitioners have available to them, and are in fact pursuing, an adequate post-deprivation remedy in state court?

TABLE OF CONTENTS

	PAGE
TABLE OF CASES, STATUTES AND ANNOTATIONS.....	1
REPLY IN OPPOSITION TO PETITION.....	3
REVISION OF STATEMENT OF THE CASE.....	4
ARGUMENT	
Merits.....	11
Adequate Post-Deprivation Remedy in State Court (Federal District Court).....	15
Collateral Attack on Judgment of Foreclosure (Rooker-Feldman Doctrine)....	16
Tax Injunction Act.....	21
Mootness.....	26
CONCLUSION.....	27

TABLE OF AUTHORITIES

CASES — PAGE

Brooks v. Nance,
801 F.2d 1237 (10th Cir. 1986).. 23

Coon v. Teasdale
567 F.2d 820 (8th Cir. 1977).... 24, 25

Fair Assessment in Real Estate Association v. McNary
(1981) 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271..... 23, 24

Fromm v. Rosewell
771 F.2d 1089 (7th Cir. 1985)... 24

Mennonite Board of Missions v. Adams
(1983) 463 US 791, 103 S.Ct. 2706, 77 L.Ed.2d 180..... 13

Ritter v. Ross
992 F.2d 750 (7th Cir. 1993).... 16, 21

Roswell v. LaSalle National Bank
(1981) 450 US 503, 101 S.Ct. 1221, 67 L.Ed. 464..... 24

Schneider Transport, Inc. v. Cattanach
637 F.2d 129 (7th Cir. 1981) cert. denied, 455 U.S. 909, 102 S.Ct. 1257, 71 L.Ed.2d 448..... 23

Wood v. Orange County
715 F.2d 1543 (1983) cert. denied, 467 U.S. 1210, 104 S.Ct. 2398, 82 L.Ed.2d 355 (1984)..... 18, 19, 20

STATUTES

28 U.S.C. 1341..... 11, 22

42 U.S.C.1983..... 11, 12, 15

Wisconsin Statutes sec. 75.521... 4, 5, 7, 9

ANNOTATIONS

Moore's Federal Practice par. 2.207 at 2286 (2nd Ed. 1977).... 27

1 L.Ed.2d 171..... 14, 19

77 L.Ed.2d 1485..... 14, 19

ELMER RITTER and HELEN RITTER,

Petitioners,

v.

PEGGY S. ROSS, STEPHEN D. MEYER and ROCK COUNTY,

Respondents,

Reply In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

The respondents Peggy S. Ross, Stephen D. Meyer and Rock County respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 992 F.2d 750 (1993) and Appellant Appendix pp 1-10.

REVISION OF STATEMENT OF THE CASE

Rock County, Wisconsin adopted the procedure set forth in Wisconsin Statute Section 75.521 as its exclusive remedy for collection of delinquent real estate taxes. It is an in rem procedure which permits the County to proceed against the land that is subject to the tax if the tax is delinquent for more than three years. The tax foreclosure proceeding is commenced annually by the County Treasurer against all properties with delinquent taxes of more than three years. The foreclosure proceeding is a Circuit Court action captioned "In the Matter of the Foreclosure of Tax Liens Under Section 75.521 Wisconsin Statutes by Rock County", receiving a case number and an assigned judge. The foreclosure matter is commenced with a petition and notice of petition, the form of which is statutorily prescribed. The

statutes require that the notice of petition and petition be:

(a) published weekly for six weeks;

(b) each person holding an interest in the real estate sought to be foreclosed must receive a copy of the petition and notice of petition by certified mail, return receipt requested.

The Petition, requests that the Court enter a judgment vesting title to the delinquent parcel in the County, as of the date of entry of judgment, and barring all claims of the former owner or any person claiming under them. The notice of the petition informs the interest holder that the holder has until a specified date to redeem the delinquent tax liens.

Wisconsin Statutes section 75.521(7) provides that an interest holder may file an answer to the petition objecting to the proposed foreclosure. By the same statute the objection is limited to the specific

defenses that:

(1) the land was not liable for taxation;

(2) the tax was in fact paid;

(3) the tax lien is barred by the Statute of Limitations.

The answer to the petition of the County must be filed within 30 days after the last date of the period for redemption stated in the Notice of Petition.

Those parcels that are not redeemed by the end of the redemption period or an answer not filed within 30 days thereafter by an interest holder proceed to judgment of foreclosure. Prior to the final hearing a guardian-ad-litem is retained by the Circuit Court to attempt to notify all persons who have not redeemed the parcels of the upcoming hearing. A hearing date is set and on that date all parcels which have not been redeemed or an answer entered are subject to a judgment of foreclosure which

vests title in Rock County. Subsequently, Rock County attempts to dispose of all lands it has acquired through the foreclosure process at a statutorily authorized and advertised public auction. The Wisconsin foreclosure statutes section 75.521(14)(a) provides that within two years from the date of entry of the judgment of foreclosure any person who was the owner of an interest in the land which was lost by judgment of foreclosure may commence an action in Circuit Court against the County to recover the fair market value of the person's interest at the date of entry of the judgment of foreclosure. The plaintiff must allege and show that any of the following exist:

(1) the land was not subject to taxation;

(2) the tax had been paid by the owner;

(3) the tax lien was barred by the

statute of limitations;

(4) or that the person lost the property through fraud without fault on his or her part.

Appellants Elmer Ritter and Helen Ritter (hereinafter "Ritter's") admit having received a copy of the County's Petition and Notice of Petition notifying them of the pendency of the action, that Rock County was foreclosing on their property and the final date for redemption. The Ritter's claim that the foreclosure procedure was constitutionally insufficient because the Wisconsin foreclosure statutes do not require that the notice of petition or petition advise the interest holder of the opportunity to enter an answer to the petition. The Notice that the Ritter's received advised them of the pendency of the foreclosure, the right to redeem and its consequences but did not contain a recitation of Wisconsin statute section

permitting them to answer.

The Ritters did nothing after receiving the Notice and Petition. Later, after the Ritter's allegedly "discovered" that the foreclosure process had been completed, they:

(a) did not appeal the judgment of foreclosure;

(b) did commence a state court action for damages pursuant to Wisconsin Statute 75.521(14a).

At the same time that they commenced the State Circuit Court action, they commenced an action against Rock County, it's Treasurer (Ross) and it's attorney (Meyer) in Federal District Court.

The decision of the Federal District Court for the Western District of Wisconsin on motion for summary judgment, was that the Ritter's federal action should be dismissed because the Ritter's due process claims were not "ripe" and could not be

considered since the state action was not complete until and unless it provides or refuses to provide a suitable post-deprivation remedy. The District Court found that there was an adequate remedy being pursued by the Ritter in the pending Wisconsin State Circuit Court action. On appeal to the Seventh Circuit Court of Appeals, the Court of Appeals decided the issue in favor of Rock County using a different rationale, the Rooker-Feldman doctrine. In its decision, the Court of Appeals determined that the federal action was most likely a collateral attack on the circuit court action of judgment of foreclosure and thus was an appropriate instance in which to apply the Rooker-Feldman bar to federal jurisdiction.

In the meantime, the Ritter's had requested the Circuit Court of Rock County stay their state court action for damages,

pending the outcome of the federal action.

ARGUMENT

I.

THIS COURT MUST DECLINE TO EXERCISE JURISDICTION OVER THE RITTERS CAUSES OF ACTION UNTIL STATE ACTION HAS BEEN COMPLETED OR THERE HAS BEEN PROVEN TO BE A LACK OF AN ADEQUATE STATE REMEDY

Whether this Court considers the rationale of the District Court or the rationale of the Seventh Circuit Court of Appeals or the rationale of the Tax Injunction Act, 28 U.S.C. 1341, advanced by appellees in their brief in opposition to motion for rehearing en banc in the Seventh Circuit, the concensus of all three doctrines is that the federal courts should not exercise jurisdiction, especially in matters of local taxation, where the state provides for a speedy, efficient and adequate post deprivation remedy or in the state courts. The Wisconsin Statutes

provide for such a remedy through either an appeal of the foreclosure action or the commencement of a seperate action for damages in state court, an option which the Ritter's are currently pursuing. Section 1983 claims may be pressed in state court actions.

The Ritters' federal action must be viewed as either:

(a) a collateral attack upon the state court's judgment of foreclosure, or

(b) a direct attack upon the constitutionality of the Wisconsin Delinquent Tax Foreclosure Statute as it relates to notice.

The merits of the Ritters' claim of lack of due process due to lack of actual notice of the right to answer the petition for foreclosure is based upon the Ritter's belief that the Due Process Clause requires that the Ritter's be given not only notice of the pendency of an action to foreclose, but that the notice be overlayed with

another constitutional right, the right to be notified of the contents of the Wisconsin Statute that they have the opportunity to object to the petition using the permissible defenses set forth in Wisconsin Statute Section 75.521(7). Conversly, Appellees believe that the constitutional requirements for notice are clear, and that all that is required of a notice of tax lien foreclosure to meet the due process requirement is "a notice reasonably calculated, under all the circumstances, to apprise the holder of a legally protected interest in the property of the pendency of the action, and to afford the interest holder an opportunity to present his or her objections. Mennonite Board of Missions v. Adams, (1983) 462 US 791, 103 S.Ct. 2706, 77 L.Ed.2d 180. (Emphasis added.) The State must make efforts to provide actual notice

of the pendency of the action to all interested parties. The Wisconsin Statute foreclosure proceeding is in rem making the land answer for delinquent real estate taxes. The primary object of the statute is to reach the land which has been assessed. The constitutional notice requirement has been determined to be satisfied by mail service to the person having an interest in the land. See the discussions of The Supreme Court's Construction of Due Process Requirements Regarding Notice in Proceeding to Foreclose Real Property Tax or Similar Lien found at Anno, 77 L.Ed.2d 1485 and Anno 1 L.Ed.2d 171. No cases cited therein require that an interest holder be given more notice than the fact that the action has been commenced for foreclosure of the tax lien. There is no overlay requirement of notifying the interest holder of what

additional statutory rights they may have.

In any event, the Ritter's section 1983 argument that there is an additional requirement of notice of right to defend can and should be thoroughly explored in the pending Wisconsin State Court action.

Adequate Post-Deprivation Remedy
in State Court
(District Court Decision)

The United States District Court for the Western District of Wisconsin's decision dismissing the Ritter complaint held that the Ritter's due process claims were not ripe and could not be considered since "the state's action is not complete until and unless it provides, or refuses to provide, a suitable post-deprivation remedy." (Appellant Appendix p. 21) The District Court found that there was an adequate remedy being pursued by the Ritters in the pending Wisconsin State

Court action for damages. The issue of whether the state was providing a suitable post-deprivation remedy was briefed by both Petitioner/Appellants and Respondent/Appellees in the Seventh Court of Appeals. However, the Seventh Circuit founded its decision on lack of federal jurisdiction on another doctrine, on the Rooker-Feldman doctrine, and made no comment on the rationale used by the District Court.

Collateral attack on Judgment of Foreclosure (Rooker-Feldman Doctrine)

The Court of Appeals Decision in this matter posed the question of whether or not to apply the Rooker-Feldman doctrine to this case in stating:

> "We must distinguish whether the Ritters are asking the Federal Court to review the State Court Judgment through use of their section 1983 action or instead are mounting a general challenge to the Wisconsin Statute which

> authorized the foreclosure of the tax lien." Ritter v. Ross, No. 92-2220 Slip Op. at pp 8-9 (7th Cir. May 7, 1993).

The Court of Appeals decison determined that under the circumstances and facts alleged, the Ritters were asking the Federal Court to collaterally attack the State Court judgment of foreclosure through use of their section 1983 action. Ritter v. Ross, supra, Appendix, p. 9.

The Ritters argue that the Rooker-Feldman doctrine was misapplied by the Seventh Circuit because it is the Ritter's belief that they have a constitutional right to notice of the statutory right to answer a Petition for Tax Foreclosure, the lack of which deprived them of their opportunity right to appear in the state foreclosure action. This is a somewhat specious argument in that the Ritters admit that they received notice of the pendency of the

action and that the County was foreclosing for delinquent taxes. Any person possessed of nominal common sense would, if believing they had paid the tax, make objection to such a petition. In support of their contention, the Ritters allege that Wood v. Orange County, 715 F.2d 1543 (1983) cert. denied, 467 U.S. 1210, 104 S.Ct. 2398, 81 L.Ed.2d 355 (1984) controls. In Wood, it was found that Rooker-Feldman could not apply in an instance where liens were obtained against the plaintiff's property by Orange County without the knowledge of the plaintiffs (the interest holders). The lynch pin of the Wood v. Orange County case is the statement cited at page 22 of Appellant's Petition:

> "Because plaintiffs did not receive actual notice of the judgment until well after the time of filing an appeal had elapsed, they lack the reasonable opportunity to appeal the judgment."

The facts of the case Wood were that the plaintiffs had no notice of the imposition of liens on their property. Wood can be distinguished because the Ritter's did receive notice of delinquent tax liens on their property and did receive notice of the pendency of the foreclosure action. They claim only that they failed to receive notice of their opportunity to answer the petition. The Wisconsin Statutes give them the right to appear and answer.

Property owners are presumed to know and are given constructive knowledge of tax assessment and collection procedures by reason of their ownership of land. See Annotations at 1 L.Ed.2d 171, supra, and 77 L.Ed.2d 1485, supra. In addition, the Ritters had actual notice of the pendency of the foreclosure action. It would be pure speculation for this Court to determine what the Ritters might have done

had the Notice they received recited the statutory opportunity to answer the Petition for Foreclosure. Such a determination should be made as a part of the factual determinations in the state court proceeding, not upon procedural constitutional grounds in federal court. The Wood v. Orange County case rests upon a constitutional challenge to the lack of notice of the imposition of a lien on property whereas the Ritter's constitutional challenge is directed to an alleged lack of actual (as opposed to constructive) notice of right to answer. The Wood v. Orange County case is not analogous and is distinguishable.

Additionally, the Circuit Court's decision approved the District Court's dismissal of the Ritter's complaint because, even if the Rooker-Feldman doctrine is inapplicable "as Judge Shabaz

noted, there are a variety of options available to the Ritters in Wisconsin state courts to either overturn the state court foreclosure judgment or to recover the proceeds from the sale of their land". (Ritter v. Ross, supra, at p. 9)

THE TAX INJUNCTION ACT

The Seventh Circuit Court of Appeals decision was based upon a determination that the Ritters were collaterally attacking the state court judgment through the use of their section 1983 action as distinguished from "a general challenge to the Wisconsin Statute which authorized the foreclosure of the tax lien". (Ritter v. Ross, supra, p. 9). Thus, if the Ritter's are determined to be not collaterally attacking the State Court judgment of foreclosure, or for some other reason the Rooker-Feldman doctrine is not applicable, the Ritter's cause of action must be a

direct attack on the constitutionality of the Wisconsin Tax Foreclosure Statute, particularly that section which requires notification of the commencement of the foreclosure action by mail notice but does not specifically require that the notice specify the interest holder's statutory opportunity to enter an objection to the petition. Indeed the Ritter's argue that the Rooker-Feldman doctrine is misapplied because they are in fact thereby prevented from mounting a constitutional challenge. (Petition For Writ of Certiorari, p. 21).

If the issue is framed as a challenge to the Rock County Ordinance adopting the Wisconsin State Law on tax lien foreclosure, the Federal District Court lacks subject matter jurisdiction by reason of the Tax Injunction Act, 28 U.S.C. Sec. 1341. Therein it is provided that the Federal District Court shall not "enjoin,

suspend or restrain the assessment, levy or collection of any tax under State law if a plain, speedy and efficient remedy may be had in the courts of such state." The act is applicable to section 1983 actions raising federal constitutional claims. Schneider Transport, Inc. v. Cattanach, 637 F.2d 129 (7th Cir. 1981) cert. denied, 455 U.S. 909, 102 S.Ct. 1257, 71 L.Ed.2d 448. Fair Assessment In Real Estate Association v. McNary, supra.

Reflecting the imperative need of a state to administer its own fiscal operations, the Tax Injunction Act's essential policy is that state and local tax systems should not be subjected to federal judicial scrutiny. Federal Court relief that interferes with state and local taxation policy, whether directly or indirectly is normally barred by section 1341. Brooks v. Nance, 801 F.2d 1237 (10th

Cir. 1986). Fair Assessment in Real Estate Association v. McNary, supra at p. 103. Rosewell v. LaSalle National Bank, (1981) 450 US 503, 101 S.Ct. 1221, 67 L.Ed. 464.

The Federal District Court and the Circuit Court of Appeals decisions determine by implication that the Wisconsin State foreclosuure statutes provide a "plain, speedy and efficient remedy" satisfying minimal procedural criteria. Fromm v. Rosewell, 771 F.2d 1089 (7th Cir. 1985).

A case in point on the application of the Tax Injunction Act to a constitutional challenge on the basis of lack of notice in a tax foreclosure proceeding is Coon v. Teasdale, 567 F.2d 820 (8th Cir. 1977). The Missouri Statutes provided a method of foreclosing tax delinquencies on real estate to establish marketable title free of tax liens. Plaintiff Coon alleged that

the statutes violated the due process clauses of the fifth and fourteenth amendments by providing for the taking of property without proper notice to the property owner. The Court stated:

> "The State Statutes provide a method for collection of state taxes and clearly fall within the scope of 28 U.S.C. Section 1341. Under these circumstances, a federal injunction is prohibited if there is an adequate state remedy...and the mere allegation of unlikely success in a state court does not render the state remedy inadequate for purposes of 28 U.S.C. Section 1341." Coon v. Teasdale, supra, 822.

Coon alleged lack of personal or actual notice of the tax foreclosure sale. As to this fundamental due process right and its apparent absence, the court stated:

> "If these allegations are true, we are confident that under current decisions of the United States Supreme Court the Missouri courts will not ignore these contentions. Constitutional claims are as cognizable in state courts as in federal courts..." Coon v. Teasdale, supra, 822.

The 8th Circuit Court of Appeals found the Tax Injunction Act to be a limitation on the jurisdiction of federal courts.

MOOTNESS

The Ritters have argued that if they had been provided with an alleged constitutionally required notice of right to answer the petition, they would have answered that they had paid the tax. This is the same answer that they have made in the state court action which is now pending. If the Ritters are successful in the state court action in proving that they did pay the tax, the entire federal court proceeding would be rendered moot. If they do not prevail in the pending state action, they have the opportunity to press their constitutional arguments through the state court system and from there to the United States Supreme Court. Judicial economy and federal court policy requires that this

matter be pursued through the state court system.

CONCLUSION

The Ritters are either: (1) attacking the state court judgment of foreclosure or, (2) mounting a constitutional challenge to the adequacy of notice of the Wisconsin Statutes relating to the tax lien foreclosure in federal court while an adequate state remedy is available and is being pursued. Either challenge is barred by federal court policy of non-interference in state actions, whether it be on the basis of the availability of alleged state post deprivation remedy or the Rooker-Feldman doctrine or the Tax Injunction Act. See generally, Moore's Federal Practice par. 2.207 at 2286 (2nd Ed. 1977). As found by the Court of Appeals, the Ritters have available to them several options in the Wisconsin State Court System, including

pressing of the action that they currently have pending in the Rock County Circuit Court. In that action, the Ritters may press their section 1983 claims. The Ritters have available to them an opportunity for a full hearing and judicial determination at which they may raise any and all constitutional objections to the collection of the tax.

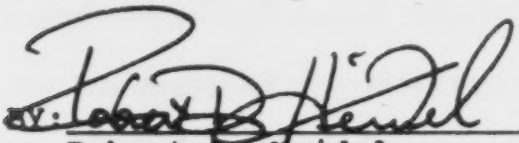
For the foregoing reasons, appellees respectfully request that this Court deny the Writ of Certiorari and affirm the Seventh Circuit Court of Appeals and District Court's decision dismissing the Ritter's complaint for failure of federal subject matter jurisdiction. Any relief for the Ritters must come from the

Wisconsin judicial system and not from the federal courts.

Respectfully submitted,

Respondents

Peggy S. Ross, Stephen D. Meyer and Rock County



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